

United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local No. 2333 (B.F. Goodrich Aerospace Landing Gear Division of the B.F. Goodrich Company) and David Smith. Case 8–CB–9023(E)

September 30, 2004

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUEMBER, AND MEISBURG

On November 26, 2003, Administrative Law Judge Earl E. Shamwell Jr. issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Respondent (Respondent or Union) filed cross-exceptions, a brief in support of its cross-exceptions, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The Union, having prevailed in the underlying unfair labor practice proceeding, now seeks to recover its attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA) and the Board's Rules and Regulations.¹ The judge, finding that this case consisted of two distinct "components," and that the General Counsel was "substantially justified" in pursuing only one of those two components, awarded the Union half of its requested fees. The General Counsel filed exceptions, arguing that the Union was not entitled to recover any fees; the Union, conversely, filed cross-exceptions seeking recovery of 100 percent of its requested fees. We find that the General Counsel was "substantially justified" in litigating the case, and we therefore dismiss in its entirety the Union's application for an award of fees.

The judge accurately stated the core law applicable to this case. EAJA entitles an eligible prevailing party in an agency adversary adjudication to an award of fees unless the agency's position was "substantially justified . . . on the basis of the administrative record, as a whole." 5 U.S.C. §504(a)(1); Section 102.143, Board's Rules and Regulations. "Substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In particular, "where the General Counsel presents evidence which, if credited by the factfinder, would constitute a prima facie

case of unlawful conduct, the General Counsel's position is deemed to be substantially justified within the meaning of EAJA." *David Allen Co.*, 335 NLRB 783, 784 (2001) (citing *SME Cement, Inc.*, 267 NLRB 763 fn. 1 (1983)).

Background

The General Counsel's complaint alleged, in essence, that the Union violated Section 8(b)(1)(A) by its handling of employee Smith's grievance.² The evidence adduced at hearing showed that: Smith began his employment with the Employer in 1978; he was a supervisor (and thus out of the bargaining unit) from 1979 through 1984; he was a poor supervisor and disliked by many employees; he was returned to the hourly ranks (and unit) in 1984; and upon his return to the unit, the Union gave him an adjusted (unit) seniority date of 1982. Smith was laid off twice during his tenure with the Employer: first, from 1994 to 1997, and second, from 1999 to 2000. Smith submitted a grievance to the Union regarding his second layoff, asserting that his hire date governed for layoff purposes. The Union refused to process the grievance, thereby prompting Smith to file an unfair labor practice charge.

In support of his complaint, the General Counsel produced evidence that the previous independent union (later affiliated with the Respondent) had used Smith's hire date, rather than his adjusted seniority date, to protect him from prior layoffs. The General Counsel also entered testimony that the old union leadership tried to explain Smith's previous protection to the new union leadership, but was met with derogatory comments about Smith. The new union leadership investigated the grievance and decided that Smith's adjusted seniority date controlled for layoff purposes. The Union thus decided not to process Smith's grievance further, taking the position that there was no contract violation.

The judge recommended that the complaint be dismissed. The judge reasoned that the complaint alleged that the Respondent refused to accept and process Smith's grievance because Smith refrained from engag-

² The complaint, par. 6, alleged in relevant part:

(C) Since on or about November 19, 1999, Respondent has failed and refused to accept and process a grievance concerning employee David Smith's layoff on or about October 22, 1999, which he attempted to file under the provisions of the agreement described above in par. 6(B).

(D) Respondent engaged in the conduct described above in par. 6(C) because employee David Smith refrained from engaging in union activities.

(E) By engaging in the conduct set forth above in pars. 6(C) and 6(D) in connection with its representative status as described above in pars. 6(A) and 6(B), Respondent has failed to represent David Smith for reasons that are unfair, arbitrary, inviolent, and has breached the fiduciary duty it owes to said employee and the Unit.

¹ Originally, the Union applied for \$19,285. The Union now claims its costs have grown, to cover the EAJA litigation itself, to \$26,115.85.

ing in union activities, and “further” alleged that the Respondent’s failure and refusal was based on reasons that were unfair, arbitrary and invidious, and, therefore, that the Respondent breached its fiduciary duty to Smith. The judge found that the record was “devoid of any meaningful evidence” supporting the first allegation, and that the General Counsel had not proved the second, commenting that “this case does not rest on credibility.” The Board subsequently dismissed the complaint, noting the General Counsel’s exception to this comment, and stated: “[W]e find that the judge made credibility findings necessary for the resolution of the legal issue of whether the Union violated Sec. 8(b)(1)(A) by refusing to accept and process the Charging Party’s grievance.” 339 NLRB 105 fn. 2 (2003).

Supplemental Decision—EAJA

The judge’s supplemental decision, considering the Union’s EAJA claim, echoes his underlying decision. His disposition of the EAJA claim rests on his finding that there were “two significant components to the charges.” Thus, the judge found that the Union was not entitled to recover fees to the extent that the General Counsel alleged that the Union failed and refused to process the grievance for reasons that were unfair, arbitrary and invidious, because that component was substantially justified. The judge also rejected the Union’s argument that the General Counsel had failed to establish the “core” charge, and he observed that the Board was correct that he had made necessary credibility findings, at least as to “one component of the charges.” Conversely, he found the Union was entitled to recover fees to the extent that it was forced to defend against a “phantom charge” that it had failed and refused to accept and process Smith’s grievance because he refrained from engaging in union activities. Ultimately, the judge awarded the Union \$9642.92, derived by the “admittedly unscientific method” of “simply dividing the Respondent’s claimed fees and costs in half.”

Parties’ Exceptions

The General Counsel excepts to the judge’s finding that the complaint involved two distinct and separate issues. The General Counsel argues that the complaint contained a *single allegation*—that the Respondent refused to accept and process Smith’s grievance in violation of Section 8(b)(1)(A) that could be supported by *two theories*: (1) that the Union’s action was motivated by Smith’s refraining from union activities, or (2) that the Union’s action was motivated by unfair, arbitrary or invidious reasons. Alternatively, the General Counsel argues that, assuming this case involves two separate allegations, the judge erred in finding that the General Coun-

sel was not substantially justified in pursuing both. Quoting *Glesby Wholesale, Inc.*, 340 NLRB 1059 (2003), the General Counsel argues that the Union is not entitled to recover fees because the General Counsel’s position, viewed as “an inclusive whole rather than as atomized line-items,” was “substantially justified.” The General Counsel maintains that its adherence to the Board’s pleading manual justifies its approach to the complaint.³

Finally, the General Counsel excepts to the judge’s order of an award and to his calculation of that award. According to the General Counsel, the judge’s initial finding that the General Counsel was substantially justified in pursuing the allegation that the Union failed to process the grievance for unfair, arbitrary and invidious motives should have terminated any legitimate claim under EAJA. Even assuming that there were two allegations, the General Counsel argues that it is inconceivable that the Union spent half of its resources on one allegation and half on the other.

The Union filed three cross-exceptions. First, and like the General Counsel, the Union argues that the complaint alleges only a single violation of Section 8(b)(1)(A). Unlike the General Counsel, however, the Union argues that the single violation is supported by a *single theory*—that the Union refused or failed to process Smith’s grievance *because* Smith had refrained from engaging in union activities. The Union supports its position with its reading of the complaint, maintaining that the “because” used in paragraph 6(D) establishes the causal link, or “sole theory,” and that paragraph 6(E), rather than advancing a second theory, merely describes the conduct alleged in paragraph 6(D) as being “unfair, arbitrary and invidious.” Alternatively, the Union argues that, assuming this case involves two theories, the General Counsel was not substantially justified in pursuing the allegation that the Union refused to process Smith’s grievance because he refrained from union activity. Moreover, the Union argues that *Glesby* does not compel dismissal of its EAJA application, given that the General Counsel failed to produce any evidence on one theory and produced discredited evidence on the other.

Second, the Union argues that the judge did not resolve credibility. The Union argues that the credibility resolutions noted by the Board involved the General

³ The judge, agreeing with the Union that the General Counsel’s adherence to the pleading manual was irrelevant, stated, “[I]t is not the ‘form’ of the complaint that controls . . . on the merits of an application for fees and costs.” (Supp. JD, fn. 4.) The General Counsel excepts to that finding. While we agree with the judge that the “form” of the complaint is not determinative for EAJA purposes, we note that this case was pled in accordance with the Board’s manual.

Counsel's "second theory" only. According to the Union, there was no need for the judge to make credibility findings on the first theory (the only one pled in the complaint) because, as the judge found, no evidence was produced as to this theory.

Third, the Union argues that the judge erred in splitting the award in half because the judge expressly found that the General Counsel presented "no meaningful evidence" to support the sole theory of the case. Thus, the Union claims that it is entitled to 100 percent of its claimed fees and expenses.

Analysis

As shown, the parties and the judge hold conflicting views regarding whether this case involved one allegation or two, one theory or two, one "component" or two, a "core theory," and so on. In our view, the case was much simpler: it involved a single grievance giving rise to a single 8(b)(1)(A) allegation. We rest our decision on that fundamental premise.⁴

By his complaint, the General Counsel alleged, in essence, that the Union breached its duty of fair representation in its handling of Smith's grievance. *Vaca v. Sipes*, 396 U.S. 171 (1967), the seminal case in this area, establishes that a breach of the duty of fair representation occurs only when conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Accordingly, the General Counsel is "substantially justified" in pursuing the complaint if it is based on evidence that, if credited, "could satisfy a reasonable person" that the Union acted arbitrarily, discriminatorily, or in bad faith in handling Smith's grievance.

We find that the General Counsel met that burden here. The judge discussed the General Counsel's evidence that the previous union had used Smith's hire date to protect him from layoffs, that he was not well liked by fellow employees, that Union officials made derogatory comments about him, and that these same officials showed little or no interest in investigating the past bases for protecting him. Considering that evidence, the judge found that the General Counsel was substantially justified in pursuing the complaint as it related to a possibly unfair, arbitrary and invidious motive in failing to process the grievance. We agree with the General Counsel that that finding should have terminated any further consideration of the Union's EAJA claim.

Our decision is bolstered by our prior finding, which the judge acknowledged in his supplemental decision,

⁴ We therefore find it unnecessary to rely on *Glesby*, which both parties cite to different ends. *Glesby* alleged violations of more than one subsection of Sec. 8(a). Here, the parties do not dispute the fact that only one violation is alleged—a violation of the duty of fair representation under Sec. 8(b)(1)(A).

that his ultimate findings in the merits phase of this case turned on credibility. Because we might well have reached a different result had the judge resolved credibility in the General Counsel's favor, we find that the General Counsel's litigation position was substantially justified. See cases cited above; see also *Barrett's Contemporary & Scandinavian Interiors*, 272 NLRB 527, 528 (1984).

In sum, we find that the judge erred by fragmenting what is, in reality, a single allegation, namely that the Union violated its duty of fair representation vis-à-vis employee Smith by its handling of his grievance. The General Counsel was substantially justified in litigating that allegation, both because: (1) it had a reasonable basis in law and fact, and (2) it involved credibility issues not subject to resolution by the General Counsel at the investigative stage of the proceeding. We thus find, contrary to the judge, that the Union's EAJA application for attorney's fees and expenses should be dismissed.

ORDER

The recommended Order of the administrative law judge is reversed in part and the Union's EAJA application for attorney's fees and expenses is dismissed.

Tom Randazzo, Esq., for the General Counsel.

Bryan O'Connor, Esq. (Joyce Goldstein & Associates), of Cleveland, Ohio, for the Respondent.

David Smith, of Parma, Ohio, for the Charging Party.

SUPPLEMENTAL DECISION

EQUAL ACCESS TO JUSTICE

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. On May 30, 2003, the National Labor Relations Board (the Board) affirmed my decision in this case (339 NLRB No. 20). I found that United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 2333 (the Respondent), did not violate Section 8(b)(1)(A) of the National Labor Relations Act (the Act) regarding its treatment of unit member and Charging Party herein, David Smith, and dismissed the complaint in its entirety.

On June 23, 2003, the Respondent filed with the Board an application for attorney's fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. Section 504 (EAJA), and Section 102.143 of the Board's Rules and Regulations. On June 25, 2003, the Board issued an Order referring the matter to me for appropriate action. The General Counsel filed a motion to dismiss the application on August 1, 2003; on August 12, 2003, the Respondent filed its response thereto. The Respondent seeks legal fees and expenses in the amount of \$17,320.00 and \$1,965.85, respectively, totaling \$19,285.85. The General Counsel contends that the Respondent is not entitled to an award under EAJA because in spite of the Respondent's having fully prevailed at the hearing, both the issuance and prosecution

of the complaint were substantially justified, as was his subsequent filing of exceptions to my decision.

On consideration of the entire record in this supplemental proceeding, including the record in the underlying unfair labor practice case, I make the following findings and conclusions of law and order.

A. Equal Access to Justice Act Applied

EAJA, as applied through Section 102.143 of the Board's Rules and Regulations, provides that the respondent "in an adversary adjudication who prevails in the proceeding, or in a significant and substantive portion of that proceeding" may apply for an award of fees and expenses incurred in the proceeding. To be eligible for an award, respondents must meet certain eligibility requirements pertaining to net worth, corporate organization, and number of employees.

Once an eligible respondent files for an award, the burden of proof is on the General Counsel to demonstrate that the Agency's position in each stage of the adjudication, including issuing and prosecuting the complaint as well as filing exceptions to the judge's decision, was substantially justified. In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court ruled that "substantial justification" as applied in an EAJA proceeding means "justified to a degree that could satisfy a reasonable person" or having "a reasonable basis both in law and fact."¹ Another basis for substantial justification exists where credibility findings are critical in resolving the case. *David Allen Co.*, 335 NLRB 783 (2001).

B. The Respondent's EAJA Application

In the instant application, the Respondent submits that at the hearing, the General Counsel offered absolutely no evidence to support what it views as the complaint's "core" allegation; that is, that the Respondent failed and refused to accept and process Smith's grievance concerning his layoff by the B.F. Goodrich Aerospace Landing Gear Division of the B.F. Goodrich Company (the Employer) because Smith refrained from engaging in union activities in violation of its duty to fairly represent him. The Respondent also notes that the General Counsel's exceptions to my decision filed with the Board did not include any argument or make reference to any evidence at trial that would support these pertinent complaint allegations.² The Respondent essentially submits that since the General Counsel, from his opening statement to the filing of exceptions on appeal,³ never adduced any evidence that Smith's union activities motivated the Respondent not to accept or process his grievance. The Respondent argues that this omission strongly suggests that there never was any such evidence to support the charges

against which, nonetheless, it was compelled to defend. The Respondent asserts thus that since there was no evidence adduced to support the charge there was not a reasonable basis in law and fact to justify the core charges.

The Respondent also contends that the General Counsel advanced other arguments not pled in the complaint and thereby forced it to address and present evidence concerning these unpled theories. The Respondent submits that in failing to pursue the theory undergirding the complaint charges and pursuing theories not contained in the original complaint, or added thereto by timely amendment, the General Counsel has not established substantial justification for the litigation.⁴

C. The General Counsel's Motion to Dismiss

The General Counsel submits, first, that the complaint accurately and sufficiently pled the allegations of wrongful conduct by the Respondent and adequately notified the Union that it was being charged with refusing to accept and process Smith's grievance for reasons that were unfair arbitrary, invidious, and in breach of its duty of fair representation. The General Counsel contends, second, that the complaint was based on significant evidence that, if credited, would have established the charges.

The General Counsel argues that the evidence adduced at trial showed that Smith was protected from layoff in the past by his union representative based on the agreed-upon hire date criterion and the then pertinent contract clauses. He contends in this regard that the failure to process Smith's grievance was contrary to past practices treating with the layoff issue.

The General Counsel also contends that there was sufficient evidence that the Respondent's failure to process Smith's grievance was based on his activities as a manager and because the current union officials disliked him. The General Counsel submits that if these reasons were credited, this would support, reasonably, an inference that the Respondent failed to act on Smith's grievances for unfair, arbitrary, and invidious reasons in breach of its fiduciary duty.

For these reasons, the General Counsel argues that he had substantial justification and a reasonable basis in law and fact in issuing the complaint, prosecuting the case, and filing exceptions.

D. Decisional Background

David Smith began his employment with the Employer in March 1978. Smith had primarily been a unit employee and continuously employed in various departments of the Company's functions. However, during the period of 1979 through 1984, Smith was employed as a maintenance supervisor. In 1984, Smith returned to an hourly status with an adjusted (unit) seniority date of October 11, 1982. Smith's employment with the Employer had been interrupted by two layoffs over time. The first period was a layoff from June 7, 1994, through September 8, 1997, and the second October 22, 1999, through

¹ The Supreme Court cites the source of that definition as a "Committee Report prepared at the time of the original enactment of the EAJA." The Report set forth "[t]he test of whether the Government position is substantially justified [as being] one of reasonableness in law and fact." H.R. Conf. Rep. No. 96-1434 p. 22 (1980).

² These allegations regarding this charge are set out in paragraphs 6(C) and (D) of the complaint.

³ I have not been provided copies of the parties' exceptions filed with the Board. However, the General Counsel does not take issue with this assertion; therefore, I will accept this point as true.

⁴ The Respondent contends that it is irrelevant that the General Counsel followed the Board's Pleading Manual for violations of Sec. 8(b)(1)(A) of the Act. I agree. For purposes of EAJA, in my view, it is not the "form" of the complaint that controls or has much bearing at all on the merits of an application for fees and costs.

April 24, 2000. The October 22, 1999 layoff formed the basis for this litigation.

Certified collective-bargaining representatives have represented unit employees like Smith since about 1979, up to present. During 1979 through 1991, the Aerol Aircraft Employees' Association (AAEA), an independent union, represented unit employees. The Respondent has represented the unit from 1991 to the present.

On October 22, 1999, Smith received official notice of his layoff from the Employer. Smith addressed this matter with a representative of the Respondent and requested that a grievance be filed. On about November 22, 1999, Smith received a letter from the Respondent advising him that it was not going to file his grievance because after investigation, it was determined that there was no violation of the collective-bargaining agreement. Further, the Respondent advised that his layoff was justified by his 1982 adjusted seniority date.

The complaint in this matter was issued on August 18, 2000, charging a violation of Section 8(b)(1)(A) of the Act by virtue of the Respondent's alleged refusal to accept or process his grievance.

E. Analysis and Discussion

Two preliminary observations. First, it should be noted that, as I stated in my decision, the complaint in question alleged essentially that the Respondent failed and refused to accept and process Smith's grievance because he refrained from engaging in union activities *and* that the failure and refusal to process the grievance was based on reasons that were unfair, arbitrary, and invidious in breach of the Union's fiduciary duty to Smith. Therefore, in my view, there were two significant components to the charges in question. This is a significant point which influenced my decision not to grant the Respondent's motion to dismiss at the conclusion of the government's case in chief.

However, the Respondent is quite correct regarding the total failure on the General Counsel's part to establish the charge that Smith's refraining from union activities was the motivation for the Respondent's not accepting or processing Smith's grievance.

On the other hand, the General Counsel clearly adduced evidence—union past practices regarding layoff and seniority and union officials' dislike for Smith—that, as noted, if credited (believed by me), could form the basis of a violation of the Act.

The Respondent stakes its claim for an award on what it described as the government's failure to establish the "core" charge. However, I do not accept that characterization; in my view, the charges, while separate, are nonetheless condign. The question is whether both charges meet the substantial justification standards. Second, there is the matter of credibility and the place this concept has in my rendering of the decision in question.

The Board, in affirming my decision in a footnote,⁵ stated, "We find that the judge made credibility findings necessary for the resolution of the legal issue, of whether [the Respondent] violated Section 8(b)(1)(A) by refusing to accept and process [Smith's] grievance." The General Counsel in the instant mo-

tion contends that I was overruled by the Board regarding my credibility findings. I disagree with his assertion and wholly agree with the Board. I note that there may have been some misunderstanding created by my choice of language—"Credibility, in my view, was not of much moment in my assessment of the merits of each party's claim." By this statement, I meant that no one witness' testimony was more believable than that of another. In so many words, in my view, each witness testified with apparent sincerity and was not contradicted by other credible evidence of record. I concluded, on balance, each testified forthrightly. Notably, Chairman Battista correctly noted in the decision that, in essence, the General Counsel failed in his burden to establish by the preponderance of the credible (testimonial) evidence the violation. Therefore, for purposes of this EAJA claim, it is clear that I made credibility findings in resolving the issues at the trial before me and that, on balance, the witnesses for each side were equally credible in my view. Thus, I would agree with the General Counsel that credibility findings on my part were critical to the resolution of at least one component of the charges.

Conclusions

I made very clear in my decision that the General Counsel adduced at trial absolutely no meaningful evidence to show that the Respondent's failure to accept or process Smith's grievance was based on or connected to his having refrained from engaging in union activities. The Respondent, in my view, was forced to defend (and expend resources) to defend against what amounts to a phantom charge. Even here, in the context of this EAJA application, the General Counsel offers nothing by way of a defense to his failure to adduce evidence on the refraining from union activities component. I firmly believe the Respondent deserves to be compensated for fees and costs relative to this charge.

On the other hand, the General Counsel, has, in my mind, demonstrated to me that at each stage of the proceedings—issuing and prosecuting the complaint, as well as filing exceptions to my decision—that he was substantially justified in pursuing the complaint allegations relating to a possibly unfair, arbitrary and invidious motive to the failure by the Respondent to handle the grievance in question. Here, credibility made the difference in my resolution of the charges. The Respondent is not, therefore, entitled to an award as to this aspect of the litigation.

Accordingly, I would find and conclude that the General Counsel had no substantial justification for issuing and prosecuting the complaint as well as filing exceptions to that aspect of the complaint relating to the failure by the Respondent to accept or process Smith's grievance because he refrained from engaging in union activities. The aforementioned stages constitute significant and discrete portions of the proceedings within the meaning of Section 102.143(b) of the Rules and Regulations. *Meaden Screw Products Co.*, 336 NLRB 298 (2001).⁶

The Respondent has therefore shown that it meets all of the eligibility requirements for relief under EAJA. I also conclude

⁵ See fn. 2 of the decision.

⁶ I would find and conclude also that no special circumstances make an award unjust.

that the Respondent is entitled to the legal fees and expenses it incurred in processing its EAJA application.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The General Counsel shall pay to the Respondent \$8660 as legal fees and \$982.92 as expenses, totaling \$9642.92 computed as of June 25, 2002.⁸

⁸ I have arrived at this award amount by an admittedly unscientific method, namely by simply dividing the Respondent's claimed fees and costs in half and allocating equal amounts of the associated fees and costs to each of what I deem to be two separate charges for purposes of this EAJA application. I believe it unrealistic and uneconomical to require the Respondent to attempt to determine how much time and resources were devoted to the defense of one specific charge *vis-a-vis* the other in this case.